75-1302

Supreme Court of the United States.

OCTOBER TERM, 1975.

GEORGE WAYNE MAHNKE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Wayne Mahnke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts. Said judgment and opinion, dated October 7, 1975, vacated a verdict of murder in the second degree and the sentence imposed pursuant thereto by the Superior Court of Suffolk County, and remanded said case to said trial court ordering the entry of a verdict of guilty of manslaughter and directing that sentence be imposed thereupon. Said sentence, upon remand, was imposed on December 15, 1975.

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (Mass. Adv. Sh. (1975) 2897) appears in the appendix hereto. Also included in the appendix are:

1. The trial court's finding of fact and rulings of law on the petitioner's pre-trial motions to suppress evidence.

2. The order of the Supreme Judicial Court, dated January 8, 1975, directing the trial judge to make supplementary findings with respect to the voluntariness of statements made by the petitioner on December 9 and 10, 1971.

3. The supplementary findings of fact promulgated by the trial court on February 12, 1975.

The inclusion in said appendix of these findings and rulings are deemed necessary for a complete and comprehensive presentation of the issues formulated herein.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

The petitioner was kidnapped on December 8, 1971 at approximately 7:30 p.m. and was not released until 24 hours subsequent thereto. After ruling that all incriminatory statements made by the petitioner to his kidnappers from the commencement of his captivity until 4:15 p.m. on the following day, December 9, 1971, were inadmissible as the product of coercion, the trial court allowed

into evidence incriminating statements and actions of the petitioner immediately subsequent thereto, but prior to his release.

I. Whether incriminating statements made by a kidnapped person to his kidnappers while still in their grip, can be constitutionally adjudicated to be acts of free will in accordance with the provisions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the incriminating statements and actions of the petitioner subsequent to 4:15 p.m. on December 9, 1971, were excludable as "fruits of the poisonous tree" and/or under the "cat out of the bag" doctrine, as the direct product of the earlier coerced statements.

III. Whether the stare decisis of *Harris* v. *New York*, 401 U.S. 222; 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971) applies to instances of intentional police misconduct.

Constitutional Provisions.

UNITED STATES CONSTITUTION,
FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

[4th] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5th] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[6th] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[14th] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On June 27, 1973, in the Superior Court of Suffolk County, the petitioner was convicted by a jury of murder in the second degree and sentenced to imprisonment for and during the term of his natural life. Prior to trial, an evidentiary hearing was held on the petitioner's motions to suppress evidence, resulting in the promulgation by the trial court of findings of fact and rulings of law, commencing on page 69 of the Appendix. An appeal was timely perfected to the Supreme Judicial Court for the Commonwealth of Massachusetts and was orally argued before said court on May 7, 1974. On January 8, 1975,

an order was promulgated by said court directing the trial judge to make "more complete findings" with regard to issues characterized in authorities cited as "break in the chain of events" and "cat out of the bag." Said order is reflected in the appendix commencing on page 1. On February 12, 1975, the trial court did promulgate said requested supplementary findings of fact which are reflected in the appendix, commencing on page 126. On October 7, 1975, the Supreme Judicial Court for the Commonwealth of Massachusetts, in a four to three decision, rendered its opinion resulting in its remand of the instant matter to the Superior Court directing that the verdict of murder in the second degree and the sentence imposed thereupon be vacated and that a verdict of guilty of manslaughter be entered with the petitioner being duly sentenced pursuant thereto. The majority of that court determined that there was no constitutional error in the admission of evidence at trial and predicated its directive for the entry of a verdict of a lesser degree of guilt upon its statutory authority of review in capital cases, as enunciated in M.G.L. c. 278, § 33E.[1] On December 15, 1975, petitioner was sentenced to a term of incarceration of not less than ten and not more than fifteen years at the Massachusetts Correctional Institution at Norfolk, Massachusetts.

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[1]Said statute provides in relevant part: "In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence . . . or for any other reason that justice may require (*a*) order a new trial or (*b*) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence." Said statute designs a "capital case" as one in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder either in the first or second degree.

Statement of the Facts.

Rhonda Bornstein disappeared on the evening of September 15, 1970 and on December 9, 1971, her body was discovered buried under an abandoned set of railroad tracks running parallel to the M.B.T.A. tracks near the Sears, Roebuck parking lot in the Fenway, near the corner of Boylston Street, Boston, Massachusetts. Her father, Manuel Bornstein, had information to the effect that his daughter had arranged to meet with the petitioner on the evening of her disappearance and had, accordingly, ab initio, been convinced that the petitioner was involved in and/or had caused his daughter's disappearance. In the fifteen month period between September 15, 1970 and December 9, 1971, he enlisted the aid of many individuals who described themselves as "concerned persons" for the purpose of assisting him in attempting to locate his daughter's whereabouts. During this same period, and as a direct result of Mr. Bornstein's suspicions regarding the petitioner, a consistent activity of harassment was conducted against said petitioner, including but not limited to constant surveillance, assaults, attempted interrogation, attempted kidnapping, and ultimately, the effectuation of a kidnapping. These acts of hostility took place near the petitioner's home, at his place of business and at Northeastern University, where the petitioner was a student. During this same period, the investigation on behalf of the Boston Police Department was delegated to Detective Stanley Gawlinski, who first became associated with the investigation of the case on December 1, 1970 and who continued in active charge of the investigation of the case and the bringing of the instant indictments against the petitioner. Detective Gawlinski maintained consistent communication with Mr. Bornstein relative to his investigative activities and was aware of the nature

of the activities being conducted by Mr. Bornstein and his group of "concerned citizens." The ineffectiveness of the harassment hereinabove generally described, as well as Mr. Bornstein's increasing dissatisfaction with the efforts of Detective Gawlinski (who had ultimately told Bornstein that without further evidence, such as a body, he could proceed no further in altering the status of the case from that of a "disappearance") culminated in the petitioner's being kidnapped in the early evening of December 8, 1971. The abduction was engaged in by Bornstein and five other individuals, to wit: Gary Fisher, James Ferreri, Frank Fontacchio, Jay Campbell and Jay Heard. The petitioner was forcibly taken to a cabin located in Worthington, Massachusetts, on December 8, 1971 and was not released until approximately 7:30 p.m. on December 9, 1971. He was held in the cabin from 10:30 p.m. on December 8, to 4:15 p.m. on December 9, 1971. During this period of time, as the result of intense interrogation predicated upon threats to his safety and life, the petitioner uttered incriminating statements, as a result of which he was transported to the Sears, Roebuck parking lot where the body of Rhonda Bornstein was discovered. Upon being released on the evening of December 9, 1971, he was taken by his parents to the Massachusetts General Hospital and was admitted to and remained in the emergency ward from 8:05 p.m. until approximately 1:15 a.m. December 10, 1971. He was subsequently interrogated by police officers at the hospital commencing at 3:30 a.m. of the same morning and ending at approximately 7:30 a.m. During the latter portion of this hospital interrogation, the petitioner again uttered incriminating statements.

The trial court suppressed all statements made by the petitioner from the time of his abduction on December 8,

until 4:15 p.m. on December 9, 1971 on the ground of involuntariness, but ruled admissible all of his immediately subsequent statements and conduct on that day, leading to the discovery of the body of Rhonda Bornstein. In so doing, the court found that all of the petitioner's conduct subsequent to 4:15 p.m. was voluntary and not the "fruits of the poisonous tree." The petitioner's hospital statements of December 10, 1971 were suppressed on the ground that his right to counsel had been intentionally denied by police interrogators, but were found to have been voluntarily made, thereby permitting their use for impeachment purposes under *Harris* v. *New York,* 401 U.S. 222, 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971).

Reasons for Granting the Writ.

I. THE INCRIMINATING STATEMENTS AND ACTIONS OF THE PETITIONER MADE TO HIS KIDNAPPERS WHILE STILL IN THEIR GRIP WERE INVOLUNTARY AND THEIR ADMISSION INTO EVIDENCE VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS.

The trial court suppressed only that part of petitioner's conduct, during the period of his abduction, which occurred prior to 4:15 p.m. on December 9, 1971. In its pretrial findings of fact relevant thereto, the trial court found the following:

1. From September 15, 1970, the date of his daughter's disappearance, Mr. Bornstein "had the volunteered assistance of the 'concerned group' and entered upon a consistent and persistent and harassing course of conduct towards the [petitioner] . . . up to and including the events of December 8, 1971 . . . . This evidenced itself almost immediately by some of the 'concerned group'

forcibly restraining Mahnke at Northeastern University, where he was a student, in broad daylight and seeking to isolate him and interrogate him" (A. 71).

2. "There was another occasion when the 'concerned group' or some of them again visited Northeastern University and again attempted to isolate and detain him. Mahnke was deeply conscious of the fact that he was being followed by this group, and on this occasion he broke away and ran to a police patrol cruiser which was in the neighborhood" (A. 71).

3. "At very frequent instances during this fifteen-month period one or more of the 'concerned group' would park a car in the area of Mahnke's house and proceed to follow him. On many of these instances I find that Mahnke knew he was in fact being followed" (A. 71).

4. Ferreri and Fontacchio, on August 17, 1971, visited the petitioner's place of employment (Henry F. Bryant & Son, Inc.) for the purpose of interrogating him. When the petitioner saw them he "immediately became frightened and turned and ran and Ferreri and Fontacchio made an effort to follow him. They were stopped by the receptionist who indicated that she was going to call the police, and they thereupon left Bryant's . . ." (A. 72).

5. On December 22, 1970, the petitioner's then attorney, William Bulger, arranged for the petitioner to be interviewed, at his office, by Detective Gawlinski. Mr. Bornstein learned that this interview was to take place resulting in Campbell and Fontacchio's conducting a surveillance of attorney Bulger's office "for at least the purpose of following him when he (Mahnke) left the office, and in view of their prior conduct it is a fair inference that they intended to again try to stop him and question him" (A. 72). Having been advised by attorney Bulger's secretary that Mahnke was not present, they left the office

and resumed their purpose of surveillance following the petitioner when he left after the interview but losing him in existing traffic. Either Campbell or Fontacchio was equipped, at this time, with a two-way walkie-talkie (A. 72).

6. When the abduction at Mt. Ida commenced at approximately 7:30 p.m. on December 8, 1971, the petitioner struggled in an effort to escape "and Ferreri hit him a vicious and punishing blow in the area of his left eye. It subsequently became inflamed, swollen, black and blue, and caused great discomfort. Mahnke's eyesight is such that he wears very strong prescription glasses at all times and has poor vision without glasses. When he was struck, he fell to the ground and lost his glasses." The petitioner never regained possession of these glasses at any time prior to at least December 10, 1971 (A. 73).

7. When the petitioner began to scream in order to attract attention, Mr. Bornstein, who was at the scene, revved up the engine of Ferreri's motor vehicle for the purpose of distracting the attention of a special police officer whom he knew to be in the vicinity, and was successful in so doing. Simultaneously, the petitioner was grabbed by Fontacchio, "a big, strong, rough, husky adult" and by Ferreri, and forced into Mr. Bornstein's motor vehicle driven by Fisher. He was pushed head first into the automobile continuing to yell and scream all the time. Once inside the car, Ferreri had a headlock on the petitioner and tilted his head onto his lap, while Fontacchio still had him by the left arm. He was placed in such a position that his head was below the level of the front seat (A. 74).

8. As Fisher drove away from the Mt. Ida campus the petitioner wrenched himself loose from the grasp of

both Ferreri and Fontacchio and as he attempted to grab Fisher around the neck from behind, he was quickly and forcibly subdued (A. 74).

9. During the drive to the cabin, the petitioner remained in virtually the same position in the continued grasp of both Ferreri and Fontacchio. "[T]he combination of shock, fear, and injury from which Mahnke was then suffering rendered him in a physical state where resistance was not possible to him and any attempt at escape would have been completely fruitless." During this time, the petitioner was bleeding fairly heavily from the face (A. 75).

10. At approximately 11:30 p.m. Ferreri and Fontacchio left the cabin leaving the petitioner in the custody of Fisher who had "obtained a bread knife approximately twelve inches long which he exhibited to Mahnke and made sure that Mahnke knew he had it" (A. 78).

11. During the period of time in which he was left alone with Fisher, the petitioner was "an extremely scared and terrified young man and didn't need any threats to keep him subdued" (A. 78).

12. At approximately 6 a.m., December 9, 1971, Ferreri and Campbell arrived at the cabin, joining Fisher, and for the next four hours "the three of them relentlessly interrogated Mahnke concerning his knowledge of the whereabouts of Rhonda Bornstein" (A. 79).

13. This interrogation was "interspersed with threats to Mahnke's life and the language used was extremely rough. If it was intended to intimidate Mahnke, it had the desired effect. I find that Mahnke was terrified, scared to death, uncertain as to whether or not they intended to kill him, and, coupled with his physical injuries and a splitting headache, nothing that he said or did could under any circumstances be considered by anybody to be voluntary" (A. 79).

14. At 10 a.m. on December 9, 1971, the group at the cabin was augmented by the arrival of Fontacchio and Heard. Confronted with these five persons, "[f]rom approximately 10 a.m. until 12 noon Mahnke was again subjected to a harassing, threatening, profane, and insistent interrogation. The threats were threats not only of physical injury to him but threats to take his life—'that he would never leave there alive.' During the entire period of time, Mahnke was completely terrified, in fear, and thoroughly subdued" (A. 80).

15. Subsequent to the brief appearance at the cabin by Chief David Tyler, the petitioner "was then subjected to the same type of grilling, threatening, harassing, insistent interrogation that had existed prior thereto until about 12:30 p.m." (A. 81).

16. Even after the petitioner (allegedly at his own request) was left alone in the "detention" room with Ferreri and Campbell, the petitioner continued, initially, to refuse to divulge any information about Rhonda Bornstein (A. 81).

17. In completely excluding any and all statements made by the petitioner prior to the departure from the cabin at 4:15 p.m., the trial court found that such statements "were involuntary and induced by threats, duress, intimidation, fear, and at least some violence (the original striking of the defendant at Mt. Ida)" (A. 83).

18. Most significantly, the petitioner's captors "decided to keep physical control of him until such time as he had showed them where the body of Rhonda Bornstein was buried" (A. 127). "[T]he first time he was free to leave with the acquiescence of the group who had originally kidnapped him was between 6:30 p.m. and 7 p.m. on December 9 when Ferreri asked Mahnke how he wanted to get home just prior to driving him home" (A. 94).

The trial court further held that "in view of the intolerable circumstances under which the statements by Mahnke were made at the cabin in Worthington and the inherent unreliability of statements coerced by violence and duress, I suppress the statements there made because I am unable to rationalize a legal philosophy making them admissible and not at the same time violating Mahnke's constitutional basic rights" (A. 110). "'[I]n light of the totality of the circumstances, the will of the defendant had been overborne so that the statement was not his free and voluntary act'" (A. 112).

Despite the unequivocal and commanding language of the trial court, as hereinabove set forth, the petitioner submits the following additional evidence, adduced at the pre-trial hearing, further emphasizing the degree of coercion exercised upon him prior to the time at which the trial court found a "change of attitude" on the part of the petitioner:

1. The frame of mind of the five kidnappers was such that they were going to keep Mahnke in the cabin until they decided he could leave (Fisher—Tr. 169).[2]

2. When the petitioner and his abductors first arrived in the cabin the temperature was below freezing (Fisher—Tr. 93), and this temperature remained constant until approximately 11 p.m., December 8, 1971 (Tr. 108).

3. During the interrogation of the petitioner on December 9, 1971, he was complaining about his face and eye (Fisher—Tr. 117).

4. During the ride from Mt. Ida to the cabin, blood was on the petitioner's face and staining his coat (Ferreri— Tr. 288).

5. The purpose of constantly following the petitioner was to determine a pattern of his movements (Ferreri—Tr. 348), and also to set up an opportunity to question

[2] "Tr." refers to pages in the original trial transcript.

him (Tr. 349). The petitioner was also followed for determining his school and work habits (Ferreri—Tr. 372).

6. At the cabin the petitioner stated that he could not see without his glasses which he was without (Ferreri—Tr. 383). At no time did anyone tell the petitioner at the cabin that he was free to leave or go wherever he wanted to go (Ferreri—Tr. 391 and 406).

7. During the ride from Mt. Ida to the cabin the petitioner kept saying, "What did I do? You don't know me. I don't know you." He received no response (Fontacchio—Tr. 700). When the group alighted from the motor vehicle upon their initial arrival at the cabin, the petitioner tripped in the snow and said that he couldn't see (Fontacchio—Tr. 733).

8. When the petitioner first arrived at the cabin his eye was "pretty swollen" and there was blood on his face and nose (Fontacchio—Tr. 742, 745).

9. Fontacchio had volunteered his services to the Bornsteins "for whatever purpose his services could be used" (Tr. 807).

10. Between 6:30 and 7:30 a.m. on December 9, 1971, the petitioner was "asleep or unconscious" (Campbell—Tr. 978).

11. Heard had conducted surveillance of the petitioner at Northeastern University "many times" (Tr. 1071) and had conducted surveillance of the petitioner's residence some two dozen times, some of which instances constituted full-day surveillances (Tr. 1108).

12. The trial court received testimony from Ralph Jacobs and Richard Jacobs, brothers, who were co-employees of the petitioner at Henry F. Bryant & Son, Inc. on August 17, 1971. This was the occasion upon which Ferreri and Fontacchio entered said premises for the purpose of seeing the petitioner. Their testimony is reflected at Tr. 1283 through 1295, and is similar, if not

identical, as to what actually transpired on that date. According to their testimony, when Ferreri and Fontacchio asked to speak with the petitioner, he was summoned and a scuffle ensued. The petitioner was heard to yell "Joe, Joe," obviously seeking help of another co-employee. The petitioner thereupon broke away from Ferreri and Fontacchio and appeared "with his hair messed and his glasses cocked." When Joe, the petitioner's co-employee, asked Ferreri and Fontacchio to leave, one of them "pushed his coat back and put his hand on his hip where there was an object." Although concealed, it was a long object resembling a stick or a knife. As they were leaving, either Ferreri or Fontacchio said to the petitioner, "George, we know what you did and you are going to pay for it—we will get you." It is significant to note that in its reference to this incident, the trial court made no finding whatsoever of a threat, a scuffle and a long concealed object strapped to the hip of one of the intruders.

13. There was an abortive attempt to kidnap petitioner in November of 1970 at Northeastern University by Mr. Bornstein and two others (Bornstein—Tr. 1876).

14. For a period of months, groups acting on behalf of Mr. Bornstein followed the petitioner from the time he left his house in the morning until the time he returned at night. This time period included both petitioner's school term and vacation (Bornstein—Tr. 1918).

15. On one occasion, Mr. Bornstein's son, Jordan, went to Northeastern University and "grabbed the [petitioner] and walked him out to the street." The petitioner kept saying he didn't know why he was being grabbed and pushed and questioned (Bornstein—Tr. 1920-1921).

16. It had been Mr. Bornstein's intention to "take" the petitioner and "keep him" until he heard answers he wanted to hear. In fact, prior to December 8, 1971,

there had been other attempts to kidnap the petitioner, which attempts had failed (Bornstein—Tr. 1938).

The ruling of the trial court admitting all conduct of the petitioner subsequent to 4:15 p.m. on December 9, 1971, was predicated upon a finding that the relationship between the petitioner and his abductors, particularly Ferreri, had "warmed considerably" (A. 81). It was also concluded that after the statements made by the petitioner at approximately 2 p.m. on December 9, "all hostility on the part of the 'Worthington Five' stopped. There was no longer any intimidation, threats, or force. Mahnke's conduct towards the group became voluntary and cooperative" (A. 83).

Nevertheless, the trial court stated: "It is difficult to understand from the evidence why a rapport or relationship of some degree of confidence and friendliness arose between Ferreri and Mahnke at this point. [12:30 p.m., December 9, 1971.] It may be that Mahnke picked out the least of all evils to be his confidant" (Ferreri A. 81).

The petitioner submits that this finding by the trial court of a sudden change of relationship between the petitioner and his kidnappers is not supported by the evidence and contends that the duress and coercion which rendered involuntary his conduct prior to 4:15 p.m. continued with this same effect up to and until the time of the petitioner's release at 7:30 p.m. all contrary to the "ultimate findings" of the trial court reflected at A. 95.

In support of his contention that his conduct remained involuntary subsequent to 4:15 p.m. and that no "spirit of cooperation and reliance and trust" existed prior thereto with regard to Ferreri (A. 95) the petitioner submits the following facts adduced at the pre-trial hearing:

1. As the group was leaving the cabin at 4:15 p.m., Ferreri said to the petitioner "you will *have* to tell me

where to go" (emphasis supplied) (Tr. 210). When the group arrived at the Sears, Roebuck parking lot in no way was the petitioner told that he was free to go (Fisher—Tr. 228).

2. When Ferreri returned from his initial fruitless search of the area beneath the tracks he commanded the petitioner to accompany him (Fisher—Tr. 237).

3. The petitioner refused to go because he was afraid the group was going to kill him (Fisher—Tr. 238, 252).

4. At the Sears, Roebuck parking lot at approximately 6 p.m. on December 9, 1971, the petitioner said "for God's sake would you please leave me alone" (Ferreri—Tr. 426).

5. During the petitioner's conversation with Campbell and Ferreri, at which point the trial court found a warming of their relationship, the petitioner "had a fear" that he "will never make it home" (Ferreri—Tr. 429).

6. Ferreri himself understood that the petitioner, at this time of alleged "confidence," felt that "he wasn't going to leave" (Tr. 431).

7. It was only after he was assured by Ferreri that he would "make it home," if he talked, did the petitioner commence to make incriminating statements (Tr. 430).

8. Before answering any questions, the petitioner made Ferreri promise that "those other kids wouldn't touch him" (Ferreri—Tr. 434).

9. When asked if he would have driven the petitioner home had he refused to answer questions, Ferreri answered "I don't know" (Tr. 445).

10. Even as the group left the cabin at 4:15 p.m., there was no assurance that they would receive from the petitioner the information they were seeking. (Ferreri—Tr. 445.)

11. During the drive from the cabin to Sears, Roebuck, the petitioner kept imploring Ferreri to "go fast, I want to lose them" (Ferreri—Tr. 457).

12. Ferreri himself acknowledged that when he requested the petitioner to go with him to the tracks at Sears, Roebuck, the petitioner again exhibited a fear for his life by stating, "I'm scared you are going to kill me" (Tr. 481).

13. Before the petitioner made any incriminating statements at the cabin regarding Rhonda Bornstein, he stated to Ferreri "if you promise me that I will make it home, I will tell you." Ferreri so promised (Tr. 539).

14. Even when the petitioner expressed fear for his life at the Sears, Roebuck parking lot, Ferreri gave him no assurance of safety. He was only told that he would not be killed (Tr. 592).

15. When the group left the cabin at 4:15 p.m., in order to proceed to Boston, they doubted the truth of what the petitioner had told them, and, when asked whether the petitioner would have been killed had his information not checked out, Fontacchio answered unequivocally "no, I don't know what would have happened" (Tr. 830). Indeed, the petitioner was advised of the still existing threat to his safety, when, as the group departed for Boston at 4:15 p.m., he was told "look, we are going to give you a chance and take you with us" (Tr. 834).

16. At the Sears, Roebuck parking lot the petitioner "seemed pretty upset" (Fontacchio—Tr. 895).

17. During the 12:30 interrogation by Ferreri and Campbell, contrary to exhibiting a feeling of trust, the petitioner was "really emotional, frightened and sweating, he wasn't in complete balance" (Campbell—Tr. 1007).

18. When the group left the cabin at 4:15 p.m. and approached Chief Tyler and his companion, Reno Liimatainen, who was holding the shotgun, Chief Tyler saw two persons separate from the group and go to the GTO automobile. Thus, prior to the threatening statement of

Liimatainen, the petitioner and Ferreri "broke away" from the group, with the remaining five, according to Chief Tyler, coming "close to me" (Tr. 1201).

19. Immediately prior to the group's departure from the cabin at 4:15 p.m., Mr. Liimatainen heard "pounding noises" coming from the cabin (Tr. 1262).

20. Mr. Liimatainen also testified that he stated "any funny business, I will blow your guts out," *after* the petitioner and Ferreri had broken off from the group and were making their way to the GTO automobile. "They [Ferreri and the petitioner] looked kind of scared" (Tr. 1264-1280).

The question of whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced statement is the subject, upon appellate review, of an independent determination. *Ashcraft* v. *Tennessee,* 322 U.S. 143; 64 S. Ct. 921; 88 L. Ed. 1192 (1944).

The true test of voluntariness is whether the statement was made freely and without compulsion or inducement of any sort. *Haynes* v. *Washington,* 373 U.S. 503; 83 S. Ct. 1336; 10 L. Ed. 2d 513 (1963). The voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon an individual so as to disable him from making a free and rational choice. *Miranda* v. *Arizona,* 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). The question must be resolved in the light of the totality of the circumstances. *Procunier* v. *Atchley,* 400 U.S. 446; 91 S. Ct. 485; 27 L. Ed. 2d 524 (1971). A confession extorted by mental coercion is as involuntary as one extorted by violence or threats of violence. *Gladden* v. *Holland,* 366 F. 2d 580 (9th Cir. 1966).

The admissibility of "self-implicating statements" is to be judged by the standards of admissibility applicable

to a confession where constitutional principles are involved. *United States* v. *Robinson,* 439 F. 2d 553 (D.C. Cir. 1970) (rehearing den. 1971). When circumstances presented for review involve two incriminating statements, the former being ruled involuntary, the admissibility of the latter depends upon the same test—is it voluntary? The fact that the earlier statement was obtained by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the utterer to such an extent that the later statement is involuntary.

Where the relationship between an earlier and admitted involuntary statement and a subsequent statement is so close that one must say the facts of one control the character of the other, the later statement is involuntary as a matter of law. *Leyra* v. *Denno,* 347 U.S. 556; 74 S. Ct. 716; 98 L. Ed. 948 (1954). In *Leyra,* both incriminating statements were extracted within a period of approximately five hours and *both were parts of one continuous process.* In the instant case, Fontacchio, one of the abductors, himself described the kidnapping from the abduction at Mt. Ida to the discovery of the body at Sears, Roebuck as "one continuous event" (Tr. 628). The petitioner does not contend that a witness's testimony is necessarily controlling on this question but submits that this testimony corroborates the contention that the mental duress effectuated by the abduction continued until 7 p.m. on December 9, 1971 which was the first time the petitioner was free to leave with the acquiescence of the group who had originally kidnapped him (A. 94).

In *Clewis* v. *Texas,* 386 U.S. 707; 87 S. Ct. 1338; 18 L. Ed. 2d 423 (1967), in holding a third statement made by the defendant to have been involuntary, the Court,

in determining the question, held that the facts relating to the third statement could not be separated from the circumstances surrounding the two earlier statements *when there was no break in the stream of events.* This criterion, the petitioner submits, is directly applicable to the instant factual situation.

The Court in *United States* v. *Bayer,* 331 U.S. 532; 67 S. Ct. 1394; 91 L. Ed. 1654 (1947), faced with the issue of admissibility of a second incriminating statement stated as follows (at page 540):

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."

In *Gladden* v. *Holland, supra,* the court, examining the totality of the circumstances, vitiated a plea of guilty entered subsequent to a confession found to be involuntary. The *Gladden* court noted that the guilty plea had been entered *within two or three hours* after the coerced confession had been given and analogized the problem to that presented when a second confession is claimed to be vitiated by an earlier coerced confession.

In *Gilpin* v. *United States,* 415 F. 2d 638 (5th Cir. 1969), where a first confession was ruled involuntary and a subsequent confession was obtained by officials armed with the earlier involuntary statement, the court held that the later confession was so closely connected with the former that it was not the product of a free and unfettered choice. The court determined the existence of a *causal relationship* between the earlier unconstitutional

conduct and the later statement. *See also Harney* v. *United States,* 407 F. 2d 586 (5th Cir. 1969).

In *Beecher* v. *Alabama,* 389 U.S. 35; 88 S. Ct. 189; 19 L. Ed. 2d 35 (1967), an accused confessed under gunpoint at the time of his arrest. This was given significant weight in holding involuntary a statement given by the accused *five days later,* after being informed of his rights to remain silent and to representation by counsel, in view of the fact that during the five days the accused had been in custody in a prison infirmary undergoing treatment for a bullet wound in his leg. Is not this custody subsequent to an involuntary statement analogous to the perpetuation of the petitioner's abduction from 4:15 p.m. to 7:30 p.m. on December 9, 1971? *See also United States ex rel. Hughes* v. *McMann,* 405 F. 2d 773 (2d Cir. 1968).

The kidnapping of the petitioner commencing at 7:30 p.m. December 8, 1971, and terminating some 24 hours later was one continuous event. There was no break in the causal relationship between the occurrences prior and subsequent to 4:15 p.m. on December 9, 1971. Even the trial court found it "difficult to understand" (A. 81) why a relationship of confidence and friendliness arose between Ferreri and the petitioner. Why, of all people, would the petitioner designate Ferreri as a confidant, the same Ferreri who administered the only conceded violence to the petitioner at the time of his abduction from Mt. Ida and at whose back the petitioner "menacingly" held a knife? (A. 92.) If an individual is being beaten and/or threatened by his inquisitors, and as a result thereof his will is overcome, can his actions be deemed to be "voluntary"? The petitioner's lack of resistance, commencing in the afternoon of December 9, 1971 was the direct result of threats, duress, intimidation, fear and

violence. Must someone who is thus victimized bear the burden of risking his life by attempting to escape at every possible opportunity and by continuing to resist ad infinitum? To answer this question affirmatively is to, in effect, forever obviate any set of circumstances under which an incriminating statement may be deemed involuntary. The inevitable conclusion thereof would be the promulgation of a doctrine wherein submission erases the legal effect of the coercion which caused it.

The trial court placed great emphasis on the petitioner's failure to cry out in the presence of Chief David Tyler and Reno Liimatainen as the group was leaving the cabin at 4:15 p.m. on December 9, 1971. He had, however, been subjected, immediately prior thereto, to kidnapping, threats, duress, intimidation, fear, and violence, all of which had culminated a 15 month period of both mental and physical harassment. There was no evidence to the effect that the petitioner knew that David Tyler was the chief of police. If he actually saw Mr. Liimatainen pointing the shotgun why must it have been necessary for him to determine whether he was in the presence of friend or foe? The testimony of both Tyler and Liimatainen reflects that as they were approached by the group emerging from the cabin, two individuals "broke off" from the group and were heading towards the GTO automobile. Could not have Ferreri been "escorting" the petitioner to the motor vehicle for the specific purpose of preventing his outcry? The sketch attached to the record by the trial court (A. 86) itself reflects that the petitioner was farthest from Liimatainen at the time of the conversation between Fisher and Tyler. The petitioner was without his glasses, but, assuming arguendo, that he actually saw Mr. Liimatainen with the shotgun, did the survival of his constitutional rights, under all of

the circumstances, depend upon whether or not he attempted an escape, the success of which can only be speculative?

Similarly, the trial court attached great significance to the petitioner's failure to yell or run away at the Sears, Roebuck parking lot at which other people were present. If these unaware Christmas shoppers were in such close proximity to the petitioner, why did not one of them observe Ferreri being followed by the petitioner openly and "menacingly" holding a knife? In this day and age, when it is not unusual for non-involved persons to stand idly by while a vicious assault or murder is being committed in their presence, should an escape obligation be imposed upon the petitioner, with the consequences of his non-compliance therewith being the attrition of his constitutional rights? Did not the presence of his five abductors constitute more of a controlling influence upon the petitioner than the proximity of strangers whose reaction, if any, can only be hypothesized? Having been kidnapped on a college campus, in the midst of college activities and in the presence of a special police officer, why should a Sears, Roebuck parking lot constitute a mandatory haven wherein continued submission to coercion is interpreted as voluntary conduct?

To conclude, with the benefit of hindsight, that the petitioner should have remained silent, attempted escape or consistently remained adamant to his five abductors, in no way takes into consideration the subjective effect of being kidnapped following a 15 month period of harassment, as is present in the instant case. What a reasonable man should do under the existing circumstances, as distinguished from that which he hypothetically might have done, should be the standard for determining the voluntariness or lack thereof with regard to his conduct.

Surely, the petitioner should not be deprived of his constitutional rights because he fervently desired the sanctuary of his home. The alleged fact that Ferreri "trusted" the petitioner reflects only the former's state of mind. To succumb to brutality is the complete antithesis of voluntary action.

Thus, the petitioner respectfully submits that all of the coercion found to have existed by the trial court prior to 4:15 p.m. continued and indeed caused the adherence of the petitioner to his captors' demands.

It can not be said that the petitioner was not *compelled* to utter statements and engage in conduct when but for the improper influence exerted upon him he would have remained silent. *Bram* v. *United States,* 168 U.S. 532; 18 S. Ct. 183; 42 L. Ed. 568 (1897).

II. The Incriminating Statements and Actions of the Petitioner Subsequent to 4:15 p.m. on December 9, 1971, Were Excludable as "Fruits of the Poisonous Tree" and/or under the "Cat Out of the Bag" Doctrine, as the Direct Products of the Earlier Coerced Statements.

The trial court, in rejecting the application of the "fruit of the poisonous tree" doctrine stated: "I can find no case which has ever held that the 'poisoned fruits' doctrine is applicable to private persons" (A. 114). Although it has been held that the Fourth Amendment, as it pertains to the protection against unreasonable searches and seizures, was intended only as a restraint on the activities of sovereign authorities (*Burdeau* v. *McDowell,* 256 U.S. 465; 41 S. Ct. 574; 65 L. Ed. 1048 (1921)), the petitioner submits that any analogy thereto, when dealing with *involuntary statements,* should not be well taken;

for involuntary statements to private individuals are inadmissible *per se,* without the necessity of those effecting the coercion being state or federal officers. Thus, involuntary statements given to private individuals, *inadmissible ab initio,* should be embraced by the extension of the "fruit of the poisonous tree" doctrine; and, indeed, by way of converse response to the trial court, the petitioner submits that there exists no case ruling negatively upon this proposition. The need to protect personal security from private as well as public invasion is certainly an important factor, and the controlling matter is the unfairness of the use of evidence improperly obtained by private individuals and the degrading of the judicial system that must necessarily accompany that use. Common sense supports such a conclusion.

Alternatively, the trial court found that the discovery of the body near Sears, Roebuck was not a "fruit" of the original involuntary statement since this evidence "did not flow from this statement," and that "the connection between the illegality and the evidence offered is so attenuated as to dissipate the taint" (A. 115). The trial court, in so holding, cited *Nardone* v. *United States,* 308 U.S. 338; 60 S. Ct. 266; 84 L. Ed. 307 (1939), but that case, however, did not address itself to the question of what attenuation would be sufficient to dissipate the taint of the initial illegality. Moreover, the *Nardone* Court held that the statute prohibiting the unauthorized publication of out-of-state or foreign communications by wire or radio did not merely interdict the introduction into evidence in a federal trial of the intercepted telephone conversations and therefore leave the prosecution free to make every other derivative use of the proscribed evidence. The *Nardone* Court reversed, holding that the trial judge had improperly refused to allow the accused to

examine the prosecution as to the uses to which it had put the illegally obtained information.

A distinct standard was provided in *Wong Sun* v. *United States,* 371 U.S. 471; 83 S. Ct. 407; 9 L. Ed. 2d 441 (1963) in which the Court stated (at page 488):

> "[T]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

The issue was again formulated in *Harrison* v. *United States,* 392 U.S. 219; 88 S. Ct. 2008; 20 L. Ed. 2d 1047 (1968). Therein, the prosecution introduced three confessions of the defendant. The defendant then took the stand and gave his version of the crime which placed him at the scene of the crime with the murder weapon but attributed his presence to a lawful purpose and the discharge of the gun to accidental causes. Harrison was convicted, but on appeal the conviction was reversed on the ground that the confessions were erroneously admitted. At a subsequent trial, the prosecution introduced Harrison's testimony at the prior trial. The Supreme Court reversed, holding that the trial testimony was the fruit of the inadmissible confession and therefore subject to exclusion. Responding to the argument that the tactical decision to testify attenuated the taint, the Court simply replied that "the question is not *whether* [Harrison] made a knowing decision to testify, but *why*" (*Harrison* at 223). "Having [used] the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony" (*Harrison* at 225). If illegally obtained evidence leads to the dis-

covery of subsequent evidence, there exists a taint caused by the initial illegality. See *United States* v. *Schipani,* 289 F. Supp. 43 (E.D. N.Y. 1968) *aff'd.* 414 F. 2d 1262 (2d Cir. 1969).

In *Wong Sun, supra,* the defendant had been taken into custody under circumstances which the Court found to constitute an improper arrest. He was, however, released on his own recognizance. He returned "voluntarily" several days later for interrogation. During that interrogation, he made incriminating oral statements. The *Wong Sun* Court's finding of sufficient attenuation to dissipate the taint was predicated upon *the period of freedom enjoyed by the defendant between the initial illegality and the subsequent incriminating statements.* No such break in the chain of events exists in the instant case.

In *Fisher* v. *Scafati,* 439 F. 2d 307 (1st Cir. 1971), a written confession was preceded by an illegally obtained oral confession, and all that intervened between the two confessions was a full warning of right to counsel and right to remain silent, which warnings did not inform the defendant that the oral confession was inva'id and could not be used against him. The court assumed that the initial illegal oral confession could have led the defendant to a belief that he was trapped, noting that the defendant had "proceeded gradually into a state of inescapable involvement," and excluded the second written confession as having been tainted by the first. *See also Gladden* v. *Holland, supra,* at 584.

In *United States ex rel. Townsend* v. *Twomey,* 322 F. Supp. 158 (N.D. Ill. 1971) the defendant's confession to murder was ruled involuntary. In said confession he gave information which led to the finding of the victim's wallet, where he said he threw it. The court excluded the wallet stating that its use "contravenes the long established doctrine against using fruit of the poisonous tree" (*Townsend,* at 177).

In *United States* v. *Killough,* 218 F. Supp. 339 (D. D.C. 1963), the court found a dissipation of the taint since after giving an inadmissible confession to the police the defendant *was afforded adequate time for deliberate reflection* prior to making a subsequent incriminating statement *which was in no way effected by coercion or other improper inducement.* Such facts, giving rise to taint dissipation, are completely absent in the instant case. It is interesting to note that upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, ruling that the second incriminating statement was inadmissible since it was made to a "classification intern" at the District of Columbia jail and the defendant had not been advised that it would not be used against him and where, had he made such inquiry, he would have received a promise that his statements would not be used against him. *Killough* v. *United States,* 336 F. 2d 929 (D.C. Cir. 1964).

The facts of the instant case in no way establish that the alleged "fruits" would have been discovered even had the original illegality not occurred. On the contrary, there is an unequivocal and inescapable "but for" causal relationship between the occurrences prior and subsequent to 4:15 p.m. December 9, 1971. In addition to emphasizing this direct causal relationship, the petitioner respectfully submits that the exclusionary "fruit of the poisonous tree" rule, especially in the context of the instant case, is required for reasons independent of its effectiveness in deterring the underlying invasion of personal rights. Reliance by courts on evidence obtained by such means may well violate a public "sense of fairness," thereby decreasing respect for the judicial system and ultimately working to its disadvantage. There exists an inherent unfairness in the use of evidence obtained as in

the instant case to the detriment of the one whose rights are violated, without regard to the effectiveness of exclusion on the protection of these same constitutional rights.

Thus the petitioner submits that all of his conduct subsequent to 4:15 p.m. "flowed" from all that had transpired prior thereto and constitutes a classic example of "fruits of the poisonous tree."

III. The Statements of the Petitioner Made to Police Officers at the Massachusetts General Hospital on December 10, 1971, should have been Suppressed for All Purposes because (A) They Were Involuntary or (B) They were Not Embraced by Harris v. New York, supra, having been Elicited as a Result of Intentional Police Misconduct.

The trial court suppressed the statements complained of for purposes of the Commonwealth's case-in-chief but allowed their potential use for the limited purpose of impeachment, all under the decision of *Harris* v. *New York*, 401 U.S. 222; 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971).

A. *The petitioner's first contention is that these statements were made involuntarily and should have been suppressed for any purpose whatsoever.*

The pre-trial testimony of Police Officer Francis Sheehan, one of the interrogators on the day in question revealed the following:

1. When he and Sgt. Daley introduced themselves to the petitioner and told him that they were there as a result of a body being found earlier that evening in the area of Sears, Roebuck, the petitioner did not answer (Tr. 1977).

2. The interrogation commenced in a hospital room and the petitioner was subsequently wheeled out in his bed to the hospital corridor (Tr. 1978).

3. The petitioner advised that he "did not want to talk about it" and when questioned would answer "I want to talk to my parents" (Tr. 1978).

4. During *the first hour* of interrogation, the petitioner said nothing, and would not respond to police questions (Tr. 1995).

5. Some questions were met with a delayed answer and others by complete silence (Tr. 1995).

6. So intense was the interrogation that the police officers were told by a hospital nurse that they were disturbing other patients (Tr. 1996).

7. The questioning of the petitioner in the hospital corridor continued for approximately 45 minutes before he was moved into a second hospital room. No incriminating statements were made by the petitioner while he was in his original room or while he was in the hospital corridor (Tr. 2000).

8. Although the police officers received permission from the nurse to interrogate the petitioner, they did not indicate to the nurse the extent of their investigation (Tr. 2003).

9. When the nurse received telephonic permission from a physician for the police officers to interrogate the petitioner, she was given no information to relay to the doctor, to whom her request was addressed, regarding the purpose or seriousness of their visit with the petitioner (Tr. 2005).

10. At the time of the interrogation Officer Sheehan knew that the petitioner had just been abducted and had received a beating (Tr. 2008).

11. The petitioner's eye was swollen to the extent that the pupil could not be seen (Tr. 2011).

12. When the petitioner was shown the "*Miranda* card," his condition was such that, in order to read it, he had to bring it to within inches from his face (Tr. 2012).

13. With regard to the incriminating statements obtained from the petitioner, "It was difficult there to get it out of him. You know, it was very slow" (Tr. 2031).

Sgt. John J. Daley, who also interrogated the petitioner on December 10, 1971, testified to the following:

1. During the course of the entire interrogation no signed statement was obtained by the officers (Tr. 2217).

2. The *first* question put to the petitioner was, "George, do you want to tell us what happened? Were you with the girl that night?" The petitioner's answer was "Where are my parents?" (Tr. 2221.)

3. When the petitioner made this first request regarding the whereabouts of his parents, the police response was, "They are home, I assume. This is your decision. You are 21 now and it's entirely your decision. Were you with the girl that night?" The petitioner did not answer (Tr. 2221).

4. During the interrogation of the petitioner in the first hospital room and subsequently in the corridor, he indicated that he wanted his parents present before any questions were asked; he did not willingly and freely volunteer any information (Tr. 2224).

5. At no time did the petitioner say, even in substance, that he was voluntarily making a statement knowing he didn't have to if he didn't want to (Tr. 2225).

6. The police officers were not confronted with a situation where the petitioner's conduct was such that they could say with intelligence that he waived his rights to *remain silent* (Tr. 2225).

7. The petitioner's manner of speech was "halting" at times (Tr. 2231).

8. After being advised of his *Miranda* rights, the petitioner asked for his parents "several times" (Tr. 2234).

Even prior to *Miranda*, the test of voluntariness was to examine the totality of the circumstances to determine if the confession or admission was voluntarily made, i.e., the failure to grant the accused access to outside assistance, including but not limited to his right to counsel. *Cartér* v. *Eyman*, 281 F. Supp. 776 (D. Ariz. 1968). A failure to warn an accused person of his right to counsel or to grant him access to outside assistance are factors tending to prove the involuntariness of the resulting confession. *Johnson* v. *New Jersey*, 384 U.S. 719; 86 S. Ct. 1772; 16 L. Ed. 2d 882 (1966). The denial of counsel to a defendant at the outset of interrogation is a significant factor in considering the voluntariness of the statements later made. *Davis* v. *North Carolina*, 384 U.S. 737; 86 S. Ct. 1761; 16 L. Ed. 2d 895 (1966). The actions of police in denying an accused his right to counsel is to be considered in determining whether a suspect's statement was made in the unfettered exercise of his own will. *Commonwealth* v. *Kleciak*, 350 Mass. 679, 216 N.E. 2d 417 (1966).

In *Haynes* v. *Washington, supra*, the United States Supreme Court held that a defendant's written confession was *involuntary* and inadmissible where it was made while the defendant was held by the police incommunicado and after he was told by police officers that he could not communicate by telephone with his wife, until he made a written confession. The attending circumstances in *Haynes*, where the defendant at first resisted making a statement and gave in only after consistent denials of his requests to call his wife, and the effectuation of such outside contact being contingent upon his accession to police demands is, the petitioner contends, analogous to the situation at the Massachusetts General Hospital.

The petitioner was released by his kidnappers at 7:30 p.m. on December 9, 1971. Within 30 minutes thereafter he was at the Massachusetts General Hospital where he remained until 3:30 a.m. the following morning, at which time his interrogation commenced. With his kidnapping experience as a subjective background, combined with what must have been emotional and physical fatigue, his initial refusal to respond to questions, his several denied requests to see his parents, the deliberate police circumvention of his right to his attorney, his being shuffled from hospital room to corridor back to hospital room, all support a finding of involuntariness. He was subjected to "an extensive interrogation" (A. 119). The fact that the petitioner answered some questions in a "halting" manner and declined to answer others is more consistent with the trait of involuntariness than with the "cagey and calculated manner" found by the trial court (A. 109). Accordingly, the petitioner submits that all statements of December 10, 1971, were involuntarily made and should have been suppressed for impeachment purposes as well as case-in-chief presentation.

B. *The petitioner alternatively submits that the December 10, 1971 incident is not embraced by Harris. Neither the United States Supreme Court decision nor the decision of the New York Court of Appeals, People* v. *Harris, 25 N.Y. 2d 175, 250 N.E. 2d 349 (1969) reflect a detailed factual account of the Harris case. Such an account, however, can be found in the initial appellate decision by the New York Supreme Court, 298 N.Y.S. 2d 245, 31 A.D. 2d 828 (App. Div., 2d Dept. 1969).*

The facts were as follows: subsequent to arrest the defendant was apprised of his privilege to remain silent and that anything he said might be used against him.

He was then questioned, but prior to making any admissions, he said he would like to speak to an attorney. The assistant district attorney brought the questioning to a close, told the defendant he had a right to counsel, and asked him if he desired to speak to an attorney then. The defendant replied that he would "call tomorrow." He asked what the charges against him were, and upon being informed, volunteered the information that everybody in his area was selling narcotics. After this statement, the assistant district attorney posed a few questions which defendant answered. *The defendant said his answers were voluntary and it was his decision to talk after requesting counsel.*

No mention of these facts is reflected in the United States Supreme Court decision. The violation of *Miranda* is merely described by the statement that no warning of a right to appointed counsel was given prior to the interrogation. The petitioner, therefore, submits that the *Harris* decision must be interpreted in the light of the actual *Harris* facts, i.e., a most technical violation of *Miranda* accompanied by the defendant specifically stating that his answers were voluntary.

Such is not the instant case, for here the trial court found that the conduct of the police officers, in interrogating the petitioner, was a deliberate course of conduct calculated to circumvent the petitioner's constitutional rights to have the benefit, aid, and counsel of his attorney (A. 108). Detective Gawlinski's presence at the hospital but his absence at the locus of interrogation was found by the trial court to be deception and circumvention (A. 119-120). The petitioner contends that the *Harris* doctrine was not intended to embrace intentional police misconduct, as distinguished from a technical violation of *Miranda*.

Indeed, the United States Supreme Court has not extended the *Harris* doctrine to cases involving intentional police misconduct nor has it been presented with such a case. See *Bryant* v. *North Carolina,* 409 U.S. 995; 93 S. Ct. 329; 34 L. Ed. 2d 259 (1972) (defendant testified at a rape trial and denied using force; police officers thereafter testified to an admission of force made by the defendant without prior *Miranda* warnings); *Riddell* v. *Rhay,* 92 S. Ct. 337; 30 L. Ed. 2d 291 (1971) (wherein the defendant, charged with assault, testified and denied having the necessary intent whereupon he was impeached by police testimony of his admission of intent uttered in the absence of *Miranda* warnings).

If the *Harris* decision were to be extended to cases involving deliberate police circumvention of constitutional rights, an unreasonable burden would be imposed upon an accused's right to testify in his own behalf. Although, as the majority in *Harris* pointed out, a criminal defendant who seeks to testify cannot demand immunity from all impeachment, the propriety of permitting impeachment of a specific kind must be a matter of balancing the value of the impeaching evidence against the costs of its admission. Given the suspicion which a violation of constitutional rights, based upon deliberate police misconduct, casts upon the reliability of a statement, the probative value of the statement would seem to be outweighed by the costs of burdening a defendant's decision to testify, of diluting the deterrent impact of the exclusionary rule, and of aligning the courts with the lawless police interrogator.

By emphasizing the necessity of voluntariness as a condition precedent to evidentiary impeachment, the *Harris* Court in no way eroded the right to due process of law embodied by the Fifth and Fourteenth Amendments. Accordingly, the petitioner contends that *Harris* should not be interpreted as obviating the Sixth Amendment right to assistance of counsel effectuated by judicially determined intentional police misconduct.

Thus, for this reason as well, the petitioner contends that his right to testify in his own behalf should not have been impeded by the permitted use for impeachment purposes of his hospital statements of December 10, 1971.

Conclusion.

In declining to suppress the conduct of the petitioner from 4:15 p.m. to 7:30 p.m. on December 9, 1971, including but not limited to his conduct leading to the discovery of the body of the deceased, the trial court erred for the following reasons:

1. Under the "totality of the circumstances" (as hereinafter set forth) the coercive circumstances, as they affected the petitioner from September 15, 1970 to 4:15 p.m. on December 9, 1971, constituted such a flagrant degree of duress so as to render the petitioner's conduct, from the commencement to the termination of his abduction, involuntary and therefore inadmissible. These circumstances do not justify the "cut-off" time of 4:15 p.m. as constituting a cessation of that degree of terrorization which effectuated the petitioner's involuntariness. The kidnapping, in the context of the preceding 15 month period of constant harassment, physical and otherwise, was a complete and unbroken event in its entirety. Any change in behavior on the part of the petitioner was the direct result of the extreme pressure put to him and did not constitute, as the trial court found, a transformation in his relationship with the Worthington Five from "abductors" to "confidants." The involuntariness of the petitioner

continued until his release at 7:30 p.m. on December 9, 1971. The coercion prior to 4:15 p.m. and the results thereof, permeated and caused the petitioner's conduct until he was physically set free. Accordingly, his "second confession" (his incriminating conduct from 4:15 p.m. to 7:30 p.m.) was so tainted by the immediate prior coercion so as to render his conduct involuntary and inadmissible.

2. The conduct of the petitioner from 4:15 p.m. to 7:30 p.m., being the direct result of what had immediately preceded it, was tainted under the "fruit of the poisonous tree" doctrine and was therefore inadmissible.

The statements by the petitioner to police officers at the Massachusetts General Hospital on December 10, 1971 should have been suppressed for any purpose whatsoever. The circumstances attending same are not embraced by *Harris* v. *New York, supra,* for in this instance the trial court found that the police officers did engage in a course of conduct *deliberately calculated* (A. 108) to circumvent the petitioner's constitutional rights to have the benefit, aid, and counsel of his attorney and that the conduct of Detective Gawlinski, who was present at the hospital, but remained downstairs during the petitioner's interrogation by other police officers amounted to "deception and circumvention" (A. 119). The petitioner contends, as more fully hereinafter set forth, that the facts of *Harris* and consequently the holding based thereupon, do not embrace intentional police misconduct as distinguished from a technical violation of the rights prescribed in *Miranda* v. *Arizona, supra.*

Moreover, the petitioner contends that his hospital statements were, in view of the "totality of the circumstances" involuntary (indeed, the trial court distinctly found no voluntary waiver of right to counsel by the petitioner) and, in addition, constituted "fruits of the poisonous tree," the taint coming from the illegal acts of private persons as hereinabove and hereinafter stated.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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